IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.06.2006

CORAM

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

W.P. No.4991 of 2006 and
W.P.M.P.No.5360 of 2006

Apollo Hospitals Enterprises Limited
Represented by Mr. S.K.Venkataraman
Company Secretary-cum-Financial Officer
Ali Towers, Fourth Floor,
55 Greams Road, Chennai - 600 006. ... Petitioner

Vs.

The Assistant Commissioner of Income Tax
Company Circle I (1) Chennai
Aayakar Bhavan - New Block
Sixth Floor, 121, Mahatma Gandhi Road,
Chennai - 600 034 ... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India Praying for the issuance of a Writ of Certiorari to call for the records on the files of the respondent herein in PAN AX 1/015/2000-01 dated 30.03.2005 under Section 148 of the Income Tax Act 1961 and quash the proceedings of the respondent in AX1/015/2000-01 dated 30.03.2005 as illegal and without jurisdiction.

For Petitioner : Mr. C.Natarajan, Senior Counsel, for
Mr. N.Inbarajan.

For Respondent : Mrs. Pushya Seetharaman.

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With the consent of counsel on either side, the writ petition itself is taken up for final disposal.

2. The prayer in the writ petition is for the issuance of a Writ of Certiorari to call for the records on the files of the respondent herein in PAN AX 1/015/2000-01 dated 30.03.2005 under Section 148 of the Income Tax Act 1961 and quash the proceedings of the respondent in AX1/015/2000-01 dated 30.03.2005 as illegal and without jurisdiction.

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3. The short facts that are necessary for the disposal of the above writ petition and as culled out from the affidavit filed in support of the writ petition are as follows:

(i) The petitioner is a registered company which is running hospitals for diagnosis, mitigation and treatment of ailments and diseases in different parts of the country. By an order of amalgamation dated 18.04.2000, a scheme was approved to amalgamate M/s. Deccan Hospital Corporation Limited (hereinafter referred to as "DHCL") running a hospital at Hyderabad, which is equipped with various diagnostic, radiological and pathological departments with the petitioner company. DHCL had an unabsorbed depreciation of Rs.11,60,29,077/- as on 31.03.1999 which under the scheme of amalgamation belonged and vested with the petitioner company. The scheme had necessary approvals of the Andhra Pradesh High Court and this Court.

(ii) In respect of the assessment year 2000-01 the petitioner submitted returns and claimed the benefit of Section 72A of the Income Tax Act (hereinafter referred to as "the Act") to have the unabsorbed depreciation of DHCL as the depreciation of the petitioner. The respondent examined the details of the case and in his letter in G.I.No.AX1-015/2000-01 dated 07.03.2003, inter alia, under Section 142 vide paragraph 7 stated as follows:

> "7. It is seen that during the previous year, Deccan Hospitals has got amalgamated with the assessee company. In this connection, you are requested to furnish the following:
>
> Amount of loss accumulated in the case of Deccan Hospitals on the date of amalgamation alongwith the years in which such loss were incurred and carried forward.
>
> P & L account and Balance Sheet of the Deccan Hospitals for the last three years and copies of assessments made during the said period".

(iii) The petitioner vide letter dated 19.03.2003 addressed to the Assessing Authority furnished all the particulars sought for. It is the case of the petitioner that being satisfied about the eligibility of the petitioner under Section 72A and after taking note of an opinion filed on behalf of the petitioner along with the returns, the assessment has been completed by the Deputy Commissioner (the then assessing officer) vide assessment order dated

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28.03.2003 under Section 143 (3) of the Act and the benefit of Section 72A of the Act was granted to the petitioner in the assessment order. It is the further case of the petitioner that the petitioner preferred an appeal in ITA No.99/03-04/A.III against certain issues and the same was disposed of by the Appellate Authority on 21.08.2003 and further appeal is said to be pending before the Income Tax Appellate Tribunal, Chennai. It is the contention of the petitioner that the order of assessment is already merged in the appellate order.

(iv) While so the respondent issued a notice under Section 148 in his proceedings in PAN AX 1/015/2000-01 dated 30.03.2005 stating that he had reasons to believe that the Income tax chargeable to tax had escaped assessment and the said notice is challenged in the writ petition.

(v) The reasons recorded for reopening the assessment are,

> "It is seen from the records that the company has claimed set off of loss to the tune of RS.11,60,29,077/- being the loss of assessment year 1999-2000 against the income and computed the balance taxable income. This loss of Rs.11,60,29,077/- represents that loss of the amalgamating company, M/s. Deccan Hospital Corporation Limited under a scheme of amalgamation. The assessee has claimed that set off of loss as per the provisions of Sec. 72 A of the Income Tax Act, vide Form No.3CD. This section prescribes where there has been an amalgamation of a company owning an industrial undertaking or a ship with another company, then alone the accumulated loss or unabsorbed depreciation of the amalgamating company shall be deemed to be the loss of the amalgamated company. In the instant case, the assessee is neither an industrial undertaking nor a company owning a ship and hence, the provisions of Sec. 72A will not apply. Hence, the set off of loss to the tune of RS.11,60,29,077/- has resulted in under assessment and income to that extent has escaped assessment".

(vi) It is the contention of the petitioner that the reasons as communicated prima facie contained no reasons except to communicate a conclusion after setting out the ingredients of the Section which do not constitute the reason. The respondent has stated that the petitioner is not an

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industrial undertaking nor a company owning a ship and that Section 72A will not apply. Overlooking the fact that the status of the assessee for the relief under Section 72A of the Act is not relevant but what is relevant is the status of the amalgamating company namely DHCL. On 09.12.2005 the petitioner addressed a letter through their authorized representative stating (i) that there was no opinion justifying the notice, that the present exercise was a mere change of opinion, (ii) that the Central Board of Direct Taxes (in short CBDT) vide Circular No.549 dated 31.10.1989 had held that a change of opinion cannot provide a reason to believe even under the amended Section 147 of the Act and (iii) that in any view the issue was concluded by the judgment of this Court in 128 I.T.R. 727 (Commissioner of Income tax, Tamil Nadu-IV Vs. Dr. V.K.Ramachandran) besides other judgments. The jurisdiction to proceed was questioned.

(vii) The impugned proceedings are challenged on the following grounds:

i) The respondent lacked complete jurisdiction in instituting proceedings under Section 147 of the Act.

ii) The impugned proceedings having regard to the orders already passed under Section 143(3) vide proceedings in assessment order dated 28.03.2003 after a full scale enquiry is a purported proceeding.

iii) The impugned proceedings are an output of mere change of opinion because a stand was correctly taken on primary facts that the ingredients of Section 72A was correctly satisfied to the benefit of the petitioner.

iv) Mere change of opinion cannot be a ground for reopening the assessment under Section 147 since a power to review on mere change of opinion will be ex facie arbitrary and violative of Article 14 of the Constitution of India, 1950.

v) The respondent has no jurisdiction on the guidelines issued under Section 147 of the Act under the circular of the Central Board of Direct Taxes vide Circular No.549 dated 31.10.1989 which denies jurisdiction on change of opinion.

vi) The reasons to believe communicated on 09.12.2005 contained no reasons but merely communicated a final assertive conclusion and fall short of the requirement to reason to believe which is preliminary to a conclusion.

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vii) The reason to believe communicated on 09.12.2005 suffers from misdirection in addressing itself and constituting that the petitioner is not an industrial undertaking, whereas the question ought to have been whether the amalgamating company owned an industrial undertaking. The error is that the respondent was looking to the petitioner and would require to be an industrial undertaking which has nothing to do with the question.

viii) The very communication dated 03.01.2005 discloses that the proceedings have been initiated not on rationale grounds but scanty enquiry and appreciation of the facts of the case as evidenced by question No.1, No.3 and No.5 of the letter enclosed to notice under Section 142 dated 03.01.2006, which are already forming part of the record of the original assessment.

ix) The respondent has no jurisdiction to bypass or ignore binding orders of this Court rendered in 128 I.T.R. 727 (Commissioner of Income Tax, Tamil Nadu-IV Vs. Dr. V.K.Ramachandran).

4. A detailed counter affidavit has been filed by the respondent containing the following contentions:

(i) The petitioner setoff the accumulated depreciation of DHCL against its Income Tax for the assessment year 2000-01 without satisfying the twin conditions stipulated in Section 72A of the Act. Section 72A which defines industrial undertaking refers to the activity of manufacturing or processing of goods. In the case of a hospital, there is no manufacturing activity and whether DHCL was processing any goods and if so, what was the installed capacity on the effective date of amalgamation is the point for consideration.

(ii) Section 72A read with Rule 9C stipulates certain condition to claim benefits under that Section and in the event of failure to comply with the said conditions within five years from the date of amalgamation, the unabsorbed depreciation shall be considered as income in the hands of the amalgamated company in the year in which the conditions are not complied with and no certificate was filed before the Assessing Authority in any of the four years from the date of amalgamation and the petitioner had not at all indicated the installed capacity of the amalgamating entity on the date of amalgamation. The decision reported in 128 I.T.R. 727 is not applicable to the facts of this case. The definition of industrial undertaking under Section 10(15)

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(iv)(c) of the Act was identical with that of Section 72A. In several judgments it was held that the diagnostic center was not processing goods as an industrial undertaking when it was exposing the films by the use of the scanner.

(iii) It is further stated in the counter affidavit that perusal of records show that the particulars claimed by the petitioner to have been furnished in response to letter dated 07.03.2003 before the Assessing Officer are not available on record. Besides, in the assessment order referred to, there is no discussion on the assessee's claim under Section 72A.

(iv) It is also contended that the assessee was not entitled to the relief of set off which was claimed, since the entity taken over was not an industrial undertaking, was the reason to believe that income had escaped assessment. The petitioner's argument that the status of the assessee was not relevant for the relief and only the status of the amalgamating company is relevant does not dilute the reason in any way since the reasons recorded bear specific reference to the provisions of Section 72A.

(v) It is further contended that the averment of the petitioner that reopening is on mere change of opinion is not correct since the records do not support the claim of the petitioner that the details have been filed and there is conscious application of mind by the assessing officer thereof was also not borne out by the assessment order. Hence when there is no opinion formed, it cannot be said that the reopening is consequent to change of opinion.

(vi) In paragraph 18 of the counter affidavit, it is stated as follows:

> "18. The contention of the petitioner that the notice under Section 148 was issued consequent to Audit objection from Audit General's Office is not fully justified. The notice was issued only after the Assessing Officer satisfied himself about the escapement of income by duly recording the reasons thereon and not merely on the basis of audit objection".

(vii) It is further contended that the assessee has failed to discharge the onus that the amalgamating company had an industrial undertaking. The amalgamating company was a hospital and that it could own an industrial undertaking was sufficient to believe that the claim of the amalgamated company was incorrect as far as claim of set off of unabsorbed depreciation is concerned and the assessment proceedings referred to, did not convey that there was

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conscious application of mind on the issue agitated and hence, reopening of the assessment within four years from the end of assessment year is justified and is in accordance with law. The proceedings are not on account of change of opinion as no opinion was formed during the course of earlier assessment proceedings. It is further contended that the reasons to believe communicated on 09.12.2005 are adequate enough to form the reason to believe that income has escaped assessment. The reasons communicated on 09.12.2005, wherein it was mentioned that the assessee did not own an industrial undertaking, did not vitiate the proceedings and the Assessing Officer is protected in accordance with the provisions of Sec. 292 B of the Act, as the reasons to believe has specific reference to the provisions of Sec. 72A of the Act.

5. Heard both.

6. Though the learned senior counsel appearing for the petitioner made several submissions the main ground of challenge to the impugned proceeding is that the respondent lacked complete jurisdiction in initiating proceedings under Section 147 of the Act since mere change of opinion cannot be a ground for reopening the assessment under Section 147 and the impugned proceeding is contrary to the guidelines issued under Section 147 of the Act by the Central Board of Direct Taxes vide Circular No.549 dated 31.10.1989. If this ground of challenge is accepted no other submission made by the learned senior counsel need be considered. Therefore the above said contention of the learned senior counsel is taken up for consideration first. Therefore, it is crystal clear that the respondent cannot supplement fresh reasons in the shape of counter affidavit or otherwise. In this case, the respondent has stated several reasons in the counter affidavit which were not stated in the impugned proceedings and in the light of the above said decision of the Honourable Supreme Court of India the same cannot be looked into.

7. The learned senior counsel submitted that the petitioner submitted returns for the assessment year 2000-01 and claimed benefit of Section 72A of the Act to have the unabsorbed depreciation of DHCL as the depreciation of the petitioner and the assessing officer after examining the details of the case by his notice dated 07.03.2003 issued under Section 142(1) of the Act called upon the petitioner to furnish several details and paragraph-7 of the notice pertains to the petitioner's claim for benefit under Section 72A of the Act. The said paragraph 7 has been extracted supra. The petitioner furnished the particulars vide its letter dated 19.03.2003 and the Deputy Commissioner of Income Tax, Company Circle I (1), who was the appropriate Assessing Authority at the relevant time, after taking note of the opinion filed on behalf of the petitioner along with the

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returns was satisfied about the eligibility of the petitioner under Section 72A and passed the assessment order dated 28.03.2003 under Section 143 (3) of the Act. The benefit of Section 72A was granted in the assessment order. According to the learned senior counsel all the relevant facts were disclosed to the Assessing Officer and the Assessing Officer having deliberated upon the entitlement of the petitioner had allowed the claim. The assessment was sought to be reopened merely on the ground of "change of opinion" by the respondent on the same facts. The respondent cannot simply review the assessment order passed by his predecessor, a power which is not conferred on him by the Act. The respondent had "no reason to believe" that any income had escaped assessment within the meaning of Section 147 of the Act and the notice issued under Section 148 is therefore without jurisdiction. Referring to the averments contained in paragraph 13 of the counter affidavit wherein it is stated that the particulars said to have been furnished by the petitioner in response to letter dated 07.03.2003 before the Assessing Officer are not available on record, the learned senior counsel submitted that if the original records are perused it could be seen that the petitioner actually furnished all the details sought for. Accordingly, the files produced by the learned Standing Counsel for the Income Tax Department was perused. At page-5 of the file, the following notings are found, viz.,

> "Notice u/s 142(1) posting the case for hearing on 13.03.2003 typed & put up.
> Sd/-..
> 7/3/03.
>
> Shri. V.Venugopal Gl Manager (fin) appeared. Shri. Nageswara Rao, Asst. Manager of the a Co. appeared. Filed the details called for.
>
> Sd/-..
> 20.03.2003"

In view of the above said notings the contention of the respondent in this regard is liable to be rejected and the contention of the learned senior counsel for the petitioner that the particulars called for were produced before the Assessing Officer has to be accepted.

8. The learned senior counsel submitted that the so called "reasons to believe" stated in the impugned proceedings are sought to be supplemented by new reasons stated in the counter affidavit which according to the learned senior counsel is not permissible in view of the law laid down by the Honourable Supreme Court of India. The Honourable Supreme Court of India in the case of Mohinder Singh Gill Vs. The Chief Election Commissioner and others reported in A.I.R. 1978 (2) S.C.J. 441 has laid down in paragraph 8 as follows:

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> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J., in Commissioner of Police Vs. Gordhandas Bhanji.
>
> > "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of *explanations* subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".
>
> Orders are not like old wine becoming better as they grow older."

9. Therefore the contention of the learned senior counsel has to be considered in the light of the "reasons to believe" as contained in the impugned proceedings. The learned senior counsel relied upon the following passage found at page 177 of the decision rendered in the case of Jindal Photo Films Limited Vs. Deputy Commissioner of Income Tax and another and reported in 234 I.T.R. 170 (Delhi), which reads as follows:

> "Where the Income-tax Officer (very often successor-officer) attempts to reopen the assessment because the opinion formed earlier by himself (or more often, by a predecessor-Income-tax Officer), was in his opinion incorrect, judicial decisions have consistently held that this could not be done. (See *Indian and Eastern Newspaper Society Vs. C.I.T.* (1979) 119 I.T.R. 996 (S.C.) and A.L.A.Firm Vs. C.I.T. (1991) 189 I.T.R. 285 (S.C.))."

Based on that the learned senior counsel submitted that the Deputy Commissioner of Income-tax, Company Circle I (1), who was the appropriate Assessing Authority at the relevant time, after perusing the particulars furnished by the petitioner and after conducting an

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enquiry and after hearing the representatives of the petitioner on 20.03.2003 and on being satisfied about the eligibility of the petitioner under Section 72A and after taking note of an opinion filed on behalf of the petitioner along with the returns passed the assessment order dated 28.03.2003 under Section 143 (3) of the Act granting the benefit under Section 72A of the Act. The attempt of the respondent to reopen the assessment, because the opinion formed earlier by his predecessors was in his opinion wrong, is contrary to the law laid down by the Honourable Supreme Court of India and the Division Bench of the Delhi High Court reported in 234 I.T.R. 170. The said contention of the learned senior counsel was sought to be countered by the learned standing counsel for the Income-tax Department by submitting that the Assessing Officer (The Deputy Commissioner of Income-tax) had not formed any opinion. The learned standing counsel for the Income-tax Department further submitted that a perusal of the original assessment order shows that the assessing officer had not formed any opinion while allowing the petitioner's claim for set-off and there is absolutely no discussion regarding the eligibility of the petitioner under Section 72A of the Act and as such there can be no change of opinion on the part of the respondent and therefore the contention of the learned senior counsel is liable to be rejected. In support of her contentions she relied upon the decision of the Gujarat High Court reported in 236 I.T.R. 832.

10. The learned senior counsel for the petitioner relied upon a full bench decision of the Delhi High Court rendered in the case of The Commissioner of Income-Tax Vs. Kelvinator of India Limited and reported in 256 I.T.R. 1. At page 19 of the said decision, it is observed as follows:

> "We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of Section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction

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> upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong".

The learned senior counsel submitted that the above extracted passage effectively answers the contention of the learned standing counsel for the Income Tax Department. It is seen from the above judgment that the decision reported in 236 I.T.R. 832 (Gujarat) relied upon by the learned standing counsel for the Income-Tax Department has been dissented from. Hence, the said submission of the learned senior counsel merits acceptance as the contention of the learned standing counsel for the Income Tax Department is liable to be rejected.

11. The learned senior counsel further submitted that only when there is a change of law or new materials come on record or information is received, the respondent can initiate the proceedings under Section 147 of the Act, but not otherwise. He further contended that by a mere fresh application of mind to the same set of facts the respondent cannot seek to reopen the assessment by initiating proceedings under Section 147 of the Act.

12. The power to reopen an assessment was conferred by the Legislature not with the intention to enable the Income-tax Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods. (See C.I.T. Vs. Rao Thakur Narayan Singh (1965) 56 I.T.R. 234, 239 (S.C.)).

13. In Phool Chand Bajrang Lal (1993) 203 I.T.R. 456, 477 (S.C.), their Lordships have held while interpreting Section 147 as it stood in the assessment year 1963-64:

> "An Income-tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on the basis of specific reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to Income-tax has escaped assessment. He may start reassessment proceedings, either because some fresh facts had come to light which were not previously disclosed or some information with regard

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> to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief".

The above said two judgments of the Honourable Supreme Court of India clearly lay down that the respondent cannot reopen the assessment order passed by mere change of opinion or by drawing a different inference from the same facts as were earlier available. Admittedly, in this case there is no change of law and no fresh material has come on record enabling the respondent to invoke the powers under Section 147 of the Act. The instant case is a case of mere change of opinion which does not provide jurisdiction to the respondent to initiate proceedings under Section 147 of the Act.

14. It is well settled that if a notice under Section 148 of the Act has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this Court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under Sections 147 / 148 of the Act.

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15. For the foregoing reasons, the writ petition is allowed. The impugned notice under Section 147 of the Act issued by the respondent relevant to the assessment year 2000-01 is quashed. No costs. Consequently the connected WPMP is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

srk

To

The Assistant Commissioner of Income Tax
Company Circle I (1) Chennai
Aayakar Bhavan - New Block
Sixth Floor, 121, Mahatma Gandhi Road,
Chennai - 600 034.

+1cc to Mr.Pushya Sitaraman, Advocate Sr 24022
+1cc to Mr.N.Inbarajan, Advocate Sr 23991

TEJ (CO)
km/29.6.

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